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**IN THE
COURT OF APPEALS OF INDIANA**

MARNIE LYNN CLARK,
Appellant-Respondent,

vs.

MICHAEL ALLEN CLARK,
Appellee-Petitioner.

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No. 55A05-0711-CV-630

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Christopher L. Burnham, Judge
Cause No. 55D02-0708-DR-326

April 4, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent Marnie Lynn Clark appeals the trial court's order granting appellee-petitioner Michael Allen Clark's petition to modify child custody. Marnie makes the following arguments: (1) the trial court erroneously excluded certain evidence; (2) the trial court erroneously placed the burden of proof on Marnie; (3) the trial court behaved in ways that render the judgment unfair and deprived Marnie of due process; and (4) Michael failed to meet his burden of showing that a change in custody was warranted and the trial court improperly relied on speculation in awarding custody to Michael. Finding no error, we affirm the judgment of the trial court.

FACTS

Marnie and Michael were married on December 1, 1996. One child, M.C., was born of the marriage on May 20, 1997. Marnie also has a son from another relationship who was approximately fourteen years old at the time of the change of custody hearing.

The couple separated on July 27, 2002, and Marnie petitioned to dissolve the marriage on June 18, 2003. Although Michael sought joint legal custody of M.C., the trial court's December 11, 2003, decree of dissolution awarded Marnie full legal and physical custody of the child.

During the spring of 2005, Michael moved to Florida. At the time of the change of custody hearing, Michael lived in Florida with his wife, Deanna Clark, and their son, K.C., who was born on September 1, 2004.

In December 2005, M.C. began exhibiting some behavioral problems, including tantrums. Shortly before Christmas 2005, Marnie, who was caring for her terminally ill father, called Michael and told him that she was under a great deal of stress and could no

longer manage M.C.'s behavior. Marnie asked Michael to travel to Indiana, pick up M.C., and take her to Florida to live with him. Michael agreed.

When M.C. arrived in Florida, she was distraught and emotionally unpredictable, and remained so for months thereafter. She continued to have violent tantrums and refused to get up in the morning. In February 2006, M.C. began seeing a clinical psychologist and showed significant improvement after two months of counseling. She initially struggled in school but eventually made the honor roll. She also became close to her half-brother, K.C. Michael paid for M.C. to fly to Indiana to visit Marnie every month, and M.C. spoke to her mother on the phone every week.

By early 2007, Marnie informed Michael that she wanted M.C. to return to Indiana to live with her at the end of the school year. They eventually agreed that M.C. would return to Indiana after the period designated in the Indiana Parenting Time Guidelines as summer visitation.

On July 6, 2007, Michael filed a petition to modify custody. On July 15, 2007, M.C. returned to Indiana to live with Marnie. M.C. began school in Indiana in the fall of 2007, earning straight As on her first report card. She showed interest in joining the choir and took weekly horseback riding lessons. On September 28, 2007, the trial court held a hearing on Michael's petition, at which Marnie appeared pro se. That same day, the trial court entered an order granting Michael's petition. Marnie now appeals.

DISCUSSION AND DECISION

I. Exclusion of Evidence

Marnie first argues that the trial court erroneously excluded evidence of Michael's criminal history and M.C.'s wishes regarding custody. The admission or exclusion of evidence is a determination entrusted to the discretion of the trial court. Leisure v. Wheeler, 828 N.E.2d 409, 417 (Ind. Ct. App. 2005). We will reverse a trial court's decision only for an abuse of discretion, which occurs when the trial court's decision is clearly erroneous and against the logic and effect of the facts and circumstances before the court. Id.

Turning first to Marnie's argument that the trial court should have admitted evidence regarding Michael's criminal history, we observe that Indiana Code section 31-17-2-21(c) provides that "[t]he court shall not hear evidence on a matter occurring before the last custody proceeding between the parties unless the matter relates to a change in the factors relating to the best interests of the child" At the hearing, Marnie began to testify that Michael "has a history with legal problems in Tennessee," at which point Michael's attorney objected because the criminal history had occurred before the prior custody proceeding and may have been entered into evidence at that proceeding. Tr. p. 46. The trial court then engaged in the following colloquy with Marnie:

Q. Let me ask you this ma'am, is it about . . . what you're about to tell me, is it something that happened before you were divorced?

A. Before we ever divorced, well, it's happened in the past and there's . . .

Q. Answer the question. Was it something that happened before the date of your divorce decree?

A. What I'm about to tell you about?

Q. Yes.

A. Part of it does, but part of it is current.

Q. Okay. Currently what are you wanting to . . . I don't want to know about the stuff before the divorce.

A. Okay. There . . . the company that [Michael] is working for has quite a few complaints against them with the Better Business Bureau in Florida . . .

Q. What has that got to do with this?

A. Because I believe that his job is in danger. There are . . .

Q. That's pure speculation at this point, ma'am. . . .

Id. at 47.

On appeal, Marnie argues that evidence regarding Michael's criminal history is relevant to M.C.'s best interests because it allegedly establishes that his recent business dealings "were reminiscent of the criminal conduct that had previously resulted in felony conviction and jail time." Appellant's Br. p. 16. Initially, we observe that she neither made this argument to the trial court nor made an offer of proof regarding the evidence and its alleged connection to Michael's then current employment situation. Moreover, we agree with the trial court that Marnie's belief that Michael's job was in danger was pure speculation. Under these circumstances, we find that the trial court did not abuse its discretion in excluding evidence of Michael's criminal history.

Marnie also contends that the trial court should have admitted evidence of M.C.'s wishes. Marnie, however, did not request that the trial court interview the child. The

only discussion of M.C.'s wishes at the hearing was the following brief exchange between Marnie and the trial court:

Q. Why is it better for [M.C.] to be living up here [in Indiana] now as opposed to down where she was [in Florida]?

A. Your Honor, because she wants to come home.

Q. Don't tell me what the child wants. That's not convincing.

Tr. p. 48-49. This discussion does not lead us to conclude that the trial court excluded evidence of M.C.'s wishes. Instead, the court merely commented that it gave little weight to Marnie's description of her daughter's desire because it did not find Marnie's testimony on the matter to be convincing. The trial court, which is vested with discretion to judge witness credibility, was well within its authority to conclude that Marnie's testimony on this matter should be given little weight.

Marnie argues that the trial court should have conducted an in camera interview of M.C. before dismissing Marnie's testimony as unreliable. Marnie has cited no persuasive authority, however, supporting the proposition that the trial court was required to conduct such an interview in the absence of a request to do so by one of the parties. Consequently, we decline to reverse on this basis.

II. Burden of Proof

Marnie next argues that the trial court erroneously placed the burden of proof on her, the respondent, when it should have been placed on Michael, the petitioner. Indiana Code section 31-17-2-21 provides that the trial court may not modify a child custody order unless the modification is in the child's best interests and there is a substantial

change in one or more of the relevant statutory factors. The petitioner bears the burden of demonstrating that the existing custody arrangement should be altered. Williamson v. Williamson, 825 N.E.2d 33, 40 (Ind. Ct. App. 2005). The burden is placed on the petitioner because “as a general position, stability and permanence are considered best for the child.” Barger v. Pate, 831 N.E.2d 758, 762 (Ind. Ct. App. 2005).

Marnie directs our attention to a single question asked of her by the trial court in support of her argument that it placed the burden of proof on her. Specifically, the trial court asked, “Why is it better for [M.C.] to be living up here [in Indiana] now as opposed to down where she was [in Florida]?” Tr. p. 48. Marnie emphasizes that the existing trial-court-approved custody arrangement provided that Marnie had custody of M.C., who was to live in Indiana. According to Marnie, the trial court’s question demonstrates that it was presuming incorrectly that the status quo was M.C.’s placement in Florida and improperly placing the burden on Marnie to prove that a permanent relocation to Indiana was in M.C.’s best interests.

It is true that Michael bore the burden of proving that a change of custody was warranted, which he does not deny. Aside from the single, isolated question set forth above, nothing in the sixty-page transcript or the custody order leads us to conclude that the trial court improperly placed the burden on Marnie. And in any event, as explained below, we find that Michael presented sufficient evidence to support the trial court’s order modifying the parties’ custody arrangement. Thus, any alleged error with respect to the burden of proof was harmless and we decline to reverse on this basis.

III. Trial Court's Actions

Next, Marnie argues that some of the trial court's statements indicate that it was relying on inappropriately gained knowledge of facts outside the evidence and that the cumulative effect of the trial court's alleged hostility towards Marnie deprived her of due process.

In support of her argument regarding improperly-gained knowledge, she directs our attention to two portions of the hearing. First, the trial court questioned Marnie regarding an incident in which she allegedly telephoned Michael's place of employment:

Q. Did you call [Michael's] place of work, as he discussed, talking about him in a negative fashion?

A. Your Honor, it wasn't like that. . . .

Q. It's a real simple question ma'am

A. Well . . .

Q. Did you call his place of work and speak to his co-workers or his supervisors in a negative fashion?

A. Your Honor, he's . . .

Q. It's a yes or no.

A. No I did not.

Tr. p. 53-54. Marnie argues that because Michael had not testified that she spoke to his colleagues in a negative fashion, the trial court must have inappropriately gained knowledge of facts outside the evidence. We cannot agree. It is apparent that the trial court was merely attempting to elicit Marnie's version of events and questioning her about a reasonable inference to have drawn—that, when she telephoned Michael's co-

workers, she may have spoken about him in a negative fashion. Merely asking these questions does not suggest that the trial court was, in any way, acting based upon inappropriately gained knowledge.

Marnie also directs our attention to another exchange, during which the trial court followed up her testimony that M.C.'s move to Florida was intended to be temporary by stating "[n]o, it wasn't temporary. . . ." Id. at 48. Marnie argues that inasmuch as no evidence indicated that the move was intended to be permanent, the trial court must have been relying on facts outside the scope of the evidence. Again, we cannot agree. When the full conversation between Marnie and the trial court is examined, it becomes apparent that in stating that M.C.'s move to Florida was not temporary, the trial court was relying on the fact that "[M.C.] stayed there through the remainder of [the] 2006 school year. Started a new school year there and finished the 2006, 2007 school year down there, right?" Id. Thus, we find no evidence supporting Marnie's argument that the trial court was relying on evidence outside the record.

Next, Marnie argues that she was deprived of due process because of the trial court's alleged hostility towards and bias against her. She contends that the trial court badgered her when questioning her in the above-described conversation about her phone calls to Michael's place of employment. We do not find the trial court's questions to rise to the level of badgering; instead, it was merely attempting to elicit a yes or no answer, which she was reluctant to provide. Marnie asked that her son be allowed to testify, but the trial court disagreed and further commented that "I don't think it's really a good idea for him to sit and listen to this hearing either. It's your choice to bring him." Tr. p. 54-

55. She argues that this statement amount to an implicit criticism of her parenting skills. While the remark may have been unnecessary, we fail to see how it establishes the trial court's hostility or bias. Finally, she argues that the trial court was "dismissive" of her testimony during several portions of the hearing. Appellant's Br. p. 15. Whether or not the trial court was dismissive, nothing in the record leads us to conclude that the trial court evinced hostility towards or bias against Marnie. Thus, her argument that she was deprived of due process must fail.

IV. The Evidence

Finally, Marnie argues that Michael failed to present sufficient evidence to warrant a change in custody and that the trial court's judgment was based on impermissible speculation. As noted above, Michael bears the burden of establishing that custody modification is in M.C.'s best interests and that there was a substantial change in one or more of the relevant statutory factors. I.C. § 31-17-2-21. The statutory factors include the following:

- (1) The age and sex of the child.
- (2) The wishes of the child's parent or parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - (A) the child's parent or parents;
 - (B) the child's sibling; and
 - (C) any other person who may significantly affect the child's best interests.
- (5) The child's adjustment to the child's:

- (A) home;
 - (B) school; and
 - (C) community.
- (6) The mental and physical health of all individuals involved.
 - (7) Evidence of a pattern of domestic or family violence by either parent.
 - (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

I.C. § 31-17-2-8. We review the trial court's ruling on a petition to modify custody for an abuse of discretion. Bryant v. Bryant, 693 N.E.2d 976, 977 (Ind. Ct. App. 1998).

Marnie contends that Michael failed to establish either a substantial change in one or more of the statutory factors or that a custody change was in M.C.'s best interests. Michael presented evidence that while living with Marnie in Indiana, M.C. began to experience behavior problems. Marnie, who was also caring for her terminally ill father, concluded that she was unable to continue to parent M.C. effectively, so she asked that Michael allow M.C. to move to Florida with him. After moving to Florida, M.C. continued experiencing many problems, but after Michael found a counselor for M.C., her behavior began to improve significantly. She settled into life in Florida, bonding with Michael and his family and doing well in school.

Although it is likewise true that upon returning to Indiana, M.C. seemingly adjusted to home and school, the evidence presented by Michael supports a conclusion that there was a substantial change in one or more of the relevant statutory factors. Specifically, M.C.'s interaction and interrelationship with her parents had changed—she was forced to leave her mother's home and then lived happily with her father and his

family for a significant period of time. Moreover, her mental health, which had suffered while living with Marnie in Indiana, improved upon moving to Florida when Michael found a counselor to help M.C. manage her behavior. Although it is a close call, we find that this evidence supports a conclusion that there was a substantial change in one or more relevant statutory factors. Similarly, we find that this evidence supports the trial court's conclusion that a change in custody would be in M.C.'s best interests. Ultimately, it is for the trial court to evaluate witness credibility and weigh conflicting evidence. Given this record, we cannot say that the trial court abused its discretion in granting Michael's petition to modify the parties' custody arrangement.

Finally, Marnie contends that the trial court impermissibly relied on speculation in making its ruling, relying on the following comments that the trial court made in explaining its decision:

[E]verything I'm hearing here, and everything I'm observing and reading just tells me that a change is needed. So, I find that there's been a substantial change in circumstances. And this was demonstrated by the fact the child lived with the father for over a year. No problems whatsoever. And all of a sudden [she] is pulled back in[to] the previous environment and this is probably very upsetting for the child and that needs to stop.

Tr. p. 59 (emphasis added). Marnie argues that the only evidence in the record regarding M.C.'s feelings was that (1) M.C. called Marnie in tears and asked to return to Indiana, id. at 53; and (2) M.C. told Michael that she did not want to decide where she would live, id. at 23-24. Thus, Marnie argues that there is no evidence supporting the trial court's speculation that the return to Indiana was upsetting for M.C.

We understand the trial court's comment to mean that the multiple changes in living situations, rather than the specific return to Indiana, was upsetting to M.C. We find that to be a reasonable inference to draw from the evidence—that a move from Indiana to Florida, where M.C. remained for over a year, followed by a move back to Indiana, was an unstable situation that would have been upsetting for any child. Moreover, as stated above, we find that the evidence supports the trial court's order modifying custody, notwithstanding any allegedly improper comment made at the hearing. Thus, we do not find this comment to support Marnie's argument that the trial court's judgment should be reversed.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and ROBB, J., concur.